IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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In its brief the state of Florida advances two alleged technical impediments to the Court's consideration of petitioner's claim that the prosecution's arguments to the jury were so flagrantly improper as to deprive him of his constitutional right to a fair trial. We first demonstrate that these procedural arguments are unsound and then consider the state's half-hearted effort to sustain petitioner's conviction and death sentence on the merits.

ARGUMENT

I.

THE COURT SHOULD DECIDE ON THE MERITS PETITIONER'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, FOR THIS QUESTION WAS ADEQUATELY PRESENTED BELOW, AND WAS DECIDED BY THE FLORIDA SUPREME COURT.

Though it did not so contend in opposition to the petition for certiorari, respondent now urges that the Court dispose of this case on procedural grounds. First, respondent says, Darden's contention that the prosecution's misconduct deprived him of a fair trial was premised and decided in the courts below upon state grounds rather than upon the Fourteenth Amendment to the Constitution; hence, according to respondent, the Court lacks jurisdiction to consider the issue under 28 U.S.C. §1257. Second, respondent contends that the Florida Supreme Court refused to set aside petitioner's conviction because the objection admittedly interposed by petitioner's trial counsel during the prosecution's summation to the jury was inadequate to preserve the issue for appellate review.

We answer these points in reverse order, dealing first with respondent's waiver claim.

A. Petitioner's trial counsel adequately objected to at least a portion of the prosecution's closing argument and, in any event, the court below considered and decided the merits of petitioner's challenge to it.

Relying upon *Estelle v. Williams*, 425 U.S. 501 (1976), and *Francis v. Henderson*, 425 U.S. 536 (1976), as controlling authority, respondent asks that Darden's conviction and death sentence be affirmed because of the alleged absence of adequate contemporaneous objection by his trial counsel to the state's acknowledged improprieties in summation. Resp. Br. pp. 14-23.[1] Several separate reasons compel rejection of respondent's position.

1. Unlike the state courts in *Estelle v. Williams, supra*, and *Francis v. Henderson, supra*, which, in accordance with settled state practice, had refused to consider untimely objections to alleged deprivations of right, here the court below fully considered and decided, albeit adversely, petitioner's claim that the prosecution's summation denied him a fair trial. Indeed, although a variety of other grounds for reversal were advanced, *Darden v. State*, 329 So.2d 287, 288 (Fla. 1976), virtually the entirety of the quite lengthy majority and dissenting opinions were devoted to the question "whether statements made by the assistant state attorneys in closing argument were so inflammatory and abusive as to have deprived Appellant of a fair trial." *Id.* at 289. Because the Florida court afforded plenary consideration to Darden's challenge to the summation, this Court may do so also, if, as we show

[1] References preceded by "Resp. Br." are to the pages of the state's brief.

hereafter (pp. 8-13, *infra*), the effect of the decision below was to deny a federal right. *Boykin v. Alabama*, 395 U.S. 238, 241-42 (1969); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Raley v. Ohio*, 360 U.S. 423, 436 (1959); *Whitney v. California*, 274 U.S. 357, 360-63 (1927).

We recognize, of course, that in the final paragraph of its opinion–as a kind of afterthought–the majority of the Florida court recited "that a prosecutor's challenged argument will be reviewed on appeal only when a timely objection is made." *Darden v. State, supra*, 329 So.2d at 291. But, even in so stating, the court did not assign inadequacy of objection as a ground of its decision and, given its protracted consideration of the merits, this Court ought not to infer a finding of waiver in the absence of a clear state court ruling to that effect, especially in a capital case. "In death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948); see *Reid v. Covert*, 354 U.S. 1, 45-46, 77-78 (1957) (concurring opinions of Justices Frankfurter and Harlan).

2. Despite the majority's citation of *State v. Jones*, 204 So.2d 515 (Fla. 1967), in the final paragraph of the decision below the usual practice of the Florida appellate courts–not only in capital cases but in all serious criminal appeals–is to consider all significant prejudicial errors, whether or not adequate objection has been made at trial. Both Florida decisional law and the rules of its Supreme Court emphasize the acknowledged "duty to overlook technical niceties in the interests of justice." *Wells v. State*, 98 So.2d 795, 801 (Fla. 1957).

Consistent with this obligation, Rule 3.7(i) of the Florida Rules of Appellate Procedure authorizes the state's appellate courts "in the interest of justice, [to] . . . notice jurisdictional or fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an assignment of error, or of an objection or exception in the court below."[2] Again, Fla. R. App. P. 6.16 empowers reviewing courts in their "discretion, if . . . the interests of justice . . . [so] require, [to] review any other things [to which no objection was taken] said or done in the cause which appear in the appeal record." In the case of "a defendant who has been sentenced to death," the rule continues, the appellate courts are also to "review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

Applying these rules, the Florida appellate courts–both prior and subsequent to *State v. Jones, supra*–have repeatedly reversed convictions because of improper prosecutorial argument during summation, despite an absence of contemporaneous objection. *E.g., Wilson v. State*, 294 So.2d 327, 329 (Fla. 1974); *Grant v. State*, 194 So.2d 612 (Fla. 1967); *Pait v. State*, 112 So.2d 380, 384 (Fla. 1959); *Singer v. State*, 109 So.2d 7, 28-30 (Fla. 1959); *Barnes v. State*, 58 So.2d 157, 158-59 (Fla. 1951); *Thompson v. State*, 318 So.2d 549 (Ct. App. Fla. 1975), *cert. denied*, 333 So.2d 465 (Fla.

[2] Improper conduct by the prosecution in summation has often been held by the Florida courts to constitute "fundamental error" for purposes of Rule 3.7(i). *E.g., Pait v. State*, 112 So.2d 380, 384 (Fla. 1959).

1976); *Knight v. State*, 316 So.2d 576 (Ct. App. Fla. 1975).[3]

Over and over again, these decisions have reaffirmed that the "absence [of objection] will not suffice [to bar appellate review] where the comments or repeated references are so prejudicial to the defendant that neither rebuke nor retraction may entirely destroy their influence in attaining a fair trial." *Wilson v. State, supra*, 294 So.2d at 329.

In similar vein, Florida's appellate courts have frequently and unhesitatingly reversed convictions, even in non-capital cases, for erroneous instructions to the jury, improper admission or exclusion of evidence, or the like, notwithstanding counsel's failure to object. *E.g., Anderson v. State*, 276 So.2d 17, 19 (Fla. 1973); *Burnette v. State*, 157 So.2d 65, 67 (Fla. 1963); *Wells v. State*, 98 So.2d 795, 801-02 (Fla. 1957); *Harrison v. State*, 5 So.2d 703 (Fla. 1942); *Cooper v. State*, 186 So. 230 (Fla. 1939); *Austin v. Wainwright*, 305 So.2d 845 (Ct. App. Fla. 1975); *Whitehead v. State*, 245 So.2d 94, 99 (Ct. App. Fla. 1971); *see Songer v. State*, 322 So.2d 481 (Fla. 1975); *LaMadline v. State*, 303 So.2d 17 (Fla. 1974).

Indeed, our examination of these and other Florida decisions on appeals from convictions for the more serious felonies suggests that reliance upon a failure of contemporaneous objection as a ground for affirmance is the exception and the contrary practice the rule. In

[3]Indeed, at one point in its brief, Resp. Br. p. 46, the state appears to acknowledge that the absence of objection "does not preclude appeallate review" under Florida practice, at least when the challenged conduct would infringe the defendant's right to due process.

such circumstances, this Court has not allowed discretionary invocation of a claim of waiver to foreclose consideration upon the merits of a deprivation of federal right. *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *Williams v. Georgia*, 349 U.S. 375, 382-83, 389-91 (1955); *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

3. Apart from these considerations, petitioner's trial counsel did, in fact, object on at least one occasion to the prosecution's conduct during summation (A-136). Thus, he requested that the court direct the prosecutor to cease expressing his wish that "someone would shoot this man [the petitioner] or that he would kill himself." The court overruled the objection without any rebuke of the prosecutor or instruction to the jury.

While this objection to the prosecution's conduct was hardly a model of precise articulation and was not reiterated, it was nonetheless sufficient to bring to the court's attention at least one facet of the prosecution's misconduct. Particularly in view of the often stated Florida rule that "it is the duty of the trial court on his own motion to restrain and rebuke counsel from indulging in [inflammatory and abusive] argument," *Grant v. State, supra*, 194 So.2d at 614; see *Thompson v. State, supra*, this objection surely afforded the trial court an opportunity to rule on the propriety of the prosecution's summation and was, for that reason, adequate to preserve the issue for appeal.

4. For all of the foregoing reasons the decisions in *Estelle v. Williams, supra*, and *Francis v. Henderson, supra*, do not govern here. In neither of those cases was any exception taken to the challenged state practice until long after the time provided by state law. As a result, in neither case had the state courts had the

opportunity to pass upon—nor had they, in fact, passed upon—the asserted deprivation of right. Moreover, in both cases, the state's reliance upon a claim of waiver accorded with settled state practice.

5. Finally, Rule 40(1)(d)(2) of this Court empowers it, " 'at its option, . . . [to] notice a plain error not presented.' " The discretion conferred by the Rule "has been long acknowledged . . . , recently affirmed . . . , and extends to review of the trial court record." *Vachon v. New Hampshire*, 414 U.S. 478, 479 n. 3 (1974); *see Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936). Invocation of the right of review afforded by this rule is particularly apt here, both because the question at issue was fully presented and decided below and because the lawfulness of a capital conviction is at issue.

B. This Court has jurisdiction to review the decision below, for the federal constitutional basis of petitioner's challenge to the prosecution's summation was adequately presented to and was passed upon by the Florida Supreme Court.

Respondent's alternative procedural argument is that the Court may not review petitioner's claim that he was deprived of a federal constitutional right since, as presented to the court below, the claim was founded on state law principles and was decided without reference to the *constitutional* right to a fair trial. Resp. Br. pp. 11-14.

Because the Florida court explicitly recited that the issue before it was "whether statements made by the assistant state attorneys in closing argument were so

inflammatory and abusive as to have deprived the Appellant of a fair trial," *Darden v. State, supra*, 329 So.2d at 289, respondent's contention, it seems to us, amounts to no more than a fine spun quibble over labels. But, even apart from this, respondent's position withstands scrutiny no more adequately than the procedural argument previously discussed.

1. First, respondent's characterization of the form in which petitioner's claim was submitted to the court below is simply inaccurate. Petitioner's assignment of error 33, submitted to the Florida Supreme Court in accordance with Fla. R. App. P. 6.7, explicitly challenged the prosecution's summation upon constitutional grounds. It recited: "Remarks during prosecutors' closing arguments were so prejudicial as to violate Defendant's right to due process of law and to a fair trial." In his brief to the Florida court petitioner specifically adverted to assignment of error 33 as the basis of his argument concerning the prosecution's summation to the jury.[4]

Taken alone, we submit that this is a sufficient affirmative showing that the failure of the majority opinion below to refer to the federal constitutional basis for petitioner's claim of deprivation of the right to a fair trial was not "due to want of proper presentation in the state courts." *Street v. New York*, 394 U.S. 576, 582 (1969).

2. Moreover, it is clear from the dissenting opinion below that the justices voting to affirm petitioner's conviction must have recognized that his claim of denial of the right to a fair trial was predicated on federal

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[4] Petitioner's brief in the Supreme Court of Florida p. 65.

constitutional grounds as well as on state law. According to the dissenters, the majority's ruling deprived petitioner of "a federal constitutional right to a fair and impartial trial in the courts of this State. U.S. Const. Amends. VI, XIV." *Darden v. State, supra,* 329 So.2d at 295. Thus, the majority of the Florida Supreme Court can hardly have failed to understand the constitutional dimension of the issue before them. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969) (four of seven Alabama Supreme Court justices discussed, *sua sponte*, the adequacy of the process by which petitioner's guilty plea had been accepted, although not in constitutional terms).

Nor can the Florida court have doubted that its affirmance of petitioner's conviction necessarily involved the rejection of a claim of federal constitutional rights. As Justice Stewart wrote for the Court in analogous circumstances in *Turner v. Louisiana*, 379 U.S. 466, 471 (1965): "While thus casting its judgment in terms of state law, the [state] court's affirmance of . . . [the] conviction necessarily rejected his claim that the conduct of the trial had violated the Fourteenth Amendment." See also *Coleman v. Alabama*, 377 U.S. 129 (1964); *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

3. In the circumstances at hand, respondent's reliance on *Cardinale v. Louisiana*, 394 U.S. 437 (1969), and like authorities, is plainly mistaken. In *Cardinale*, as in *Tacon v. Arizona*, 410 U.S. 351 (1973), *Picard v. Connor*, 404 U.S. 270 (1971), and *Hill v. California*, 401 U.S. 797 (1971), the federal questions argued to the Court "had never been raised, preserved, or passed upon in the state courts below" in any form. *Cardinale v. Louisiana, supra*, 394 U.S. at 438. Thus, the state

courts in those cases had not been afforded "a fair opportunity to consider [these constitutional] claim[s] and to correct [the] asserted constitutional defect[s]" in the defendant's convictions. *Picard v. Connor, supra,* 404 U.S. at 276.

Here, by contrast, the question whether Darden was deprived of the right to a fair trial (i) was presented to the court below in both state law and federal constitutional terms and (ii) in any event, was linguistically and analytically "the same [under both federal and state law] despite variations in the legal theory . . . urged in its support." *Picard v. Connor, supra,* 404 U.S. at 277.

Indeed, the reasons advanced by the Court in *Cardinale* for its refusal "to decide federal constitutional issues raised here for the first time on review of state court decisions," 394 U.S. at 438, point up the inapplicability of that decision to the circumstances at hand. Thus, Justice White pointed out that "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Id.* at 439. In the present case, consideration below of petitioner's claim that the prosecution's misconduct deprived him of his right to a fair trial could hardly have been more thorough; the state court considered the issue at length and on precisely the same record required to address the claim in federal constitutional terms.

Again, Justice White reasoned that "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state [law] in light of constitutional challenge." *Ibid.* Here, as we have already suggested, the Florida Supreme Court was assuredly on notice that, if state rules defining the limits of proper prosecutorial conduct did

not require the reversal of petitioner's conviction, the commands of the Fourteenth Amendment might compel such a result.

Thus, petitioner afforded the court below the opportunity that Justice White spoke of in *Cardinale*; this Court does not lack jurisdiction merely because the Florida court rejected that opportunity.

4. The cases that are controlling here are *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (*per curiam*). The former teaches that, when "the constitutional premise [has been adequately] raised below," the Court may reach its "result by a method of analysis readily available to the state court," though not utilized by it. 405 U.S. at 658 n. 10. See also *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 444 (1969); *Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590, 598-99 (1954).

Vachon establishes that, even when the federal constitutional underpinning of the contention urged upon the Court was not fully articulated below, the Court may grant relief, if the substance of the argument in both courts was the same.

In the present case, having recognized that the issue before it was whether petitioner had been denied the right to a fair and impartial trial, consideration of the issue in terms of the Due Process provision of the Fourteenth Amendment was an obvious "method of analysis readily available to the state court." Indeed, except for the label, the "method of analysis" actually employed by the court below was precisely the same as that which would have been required had the court approached petitioner's claim in federal constitutional

terms. This Court would therefore have jurisdiction over petitioner's claim even if petitioner's assignment of error had not mentioned due process and even if the dissenting opinion below had not relied on the Fourteenth Amendment.

II.

THE PROSECUTION'S MISCONDUCT IN SUMMATION DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Respondent acknowledges, as it must, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); see *Frazier v. Cupp*, 394 U.S. 731, 736 (1969), that a prosecutor's summation may so grossly transgress the bounds of legitimate jury argument as to be "constitutionally improper and [to] den[y] due process." Resp. Br. p. 28. Respondent also concedes that the prosecution's summation in this case was replete with statements that it labels variously as "utterly irrelevant," bearing "no rational relationship to the question of guilt or innocence," "inflammatory irrelevancies," "improper appeal[s] to the jury's emotions," "prejudicial," and "the ravings of the prosecutor." Resp. Br. pp. 31, 37, 38, 39. Seemingly, respondent also acknowledges that the persistence of the prosecution's misconduct is itself proof of its willfulness. Necessarily, the state's attorneys intended their outrageous arguments to influence the jury to return a guilty verdict and thereafter to recommend the imposition of a sentence of death.

Nonetheless, respondent argues, the Court should decline to hold that petitioner was deprived of his

constitutional right to a fair trial and should affirm his conviction and capital sentence. As best we can follow its reasoning, respondent relies on two alternative theories to support this extraordinary conclusion.

First, it postulates a three-fold test to measure whether a closing argument is "constitutionally improper," Resp. Br. p. 29, and then, while conceding that various portions of the summation here transgressed each facet even of its own test, asserts that no violation of petitioner's constitutional rights occurred, because no single remark of the prosecution simultaneously infringed all three. Second, respondent–as its brief puts it–seeks "refuge" in the "saving principles" of harmless constitutional error, Resp. Br. p. 41, urging that, even if the prosecution's misconduct impaired petitioner's right to a fair trial, the error should not lead to a reversal under respondent's novel reformulation of the harmless error doctrine. Resp. Br. pp. 43-44.

Respondent's contentions accord neither with common sense nor law and the Court should reject them.

1. Proceeding as if *Donnelly v. DeChristoforo, supra,* had never been decided, respondent suggests, without citation to any authority, that a closing argument may work a denial of due process only if each passage in it, taken alone, is at once inflammatory, prejudicial and unsupported by evidence. Resp. Br. pp. 28-29. It then tortuously parses the prosecution's summation, striving to show that, although many of prosecutor McDaniel's remarks were fairly branded with one or two of these characterizations in our opening brief, none of his statements, taken singly and without reference to any other, may properly be labeled with all three adjectives at once. Even then, respondent is able to conclude that petitioner was not deprived of his right to a fair trial

only by insisting that, contrary to the prosecutors' evident premise, the jurors were too intelligent and alert to the irrelevant to be influenced by such improper prosecutorial tactics.

(a) As we showed in our opening brief, pp. 25-28, the Court's focus in the *DeChristoforo* case was not upon attempts at abstract characterizations of the summation there in issue, but upon the more crucial questions of the likely impact of the challenged remarks on the jurors and the willfulness of the prosecutor's alleged misconduct. Thus, Justice Rehnquist, writing for the Court, emphasized that the portion of the prosecutor's argument there complained of was only a single sentence in a lengthy summation, that even this sentence was ambiguous in meaning and could well have slipped out without intent by the prosecutor improperly to influence the jury's deliberations, and that a specific curative instruction had been given by the trial court.

Respondent here advances no reasons for its election to ignore the considerations thought controlling by the Court in *Donnelly v. DeChristoforo*, nor does it take issue with the analysis in our opening brief of the application of the factors utilized by the *DeChristoforo* court to the case at hand. Thus, it acknowledges that McDaniel's summation was replete with "inflammatory irrelevancies" bearing "no relationship to the question [of petitioner's] guilt or innocence," Resp. Br. pp. 38, 31, does not dispute that the prosecutor's constant reiteration of numerous grossly improper themes is compelling proof of a deliberate effort to influence the jury to decide petitioner's fate by reference to considerations unrelated to the evidence at trial, and recognizes that the trial court neither rebuked the prosecutor nor

sought to nullify the impact of his remarks upon the jury.

Given respondent's failure to explain why the considerations thought controlling in *DeChristoforo* should not govern here, we submit that the Court ought not to be detained by respondent's labored effort to show that individual passages of the prosecution's argument, taken in isolation, may not have been at once inflammatory, prejudicial and unsupported by the evidence.

(b) Even apart from the *DeChristoforo* decision, however, respondent's position does not withstand analysis. First, it misreads the clear thrust of the prosecution's improper arguments to the jury. Second, it credits the jurors with a shrewdness and sophistication plainly exceeding any which the state's attorneys at trial were willing to acknowledge.

Despite respondent's tortured attempts to show the contrary, McDaniel's arguments in summation were scarcely naive ramblings of patent irrelevance, as respondent now asserts. For example, McDaniel's diatribe about the Florida Division of Corrections—a discourse conceded to have been both inflammatory and of no legitimate relevance to the jurors' deliberations—cannot, in seriousness, be dismissed as mere abstract criticism, probably without improper influence upon the jury. McDaniel made abundantly clear why, to his mind, the conduct of the Division of Corrections was germane to the jury's decision-making, reminding the jurors several times over that the Division could not be counted upon to keep the public safe from petitioner, if he were acquitted, and that a guilty verdict and recommendation of death was the only way in which the jurors would be assured that petitioner

> "isn't going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now." (A. 123).

Again, to cite just one further example, McDaniel's often-voiced desire that Darden had been killed or maimed—a desire whose recurrent expression in summation respondent itself dubs as "inflammatory irrelevancies," Resp. Br. p. 38—may not be dismissed as so lacking in an appearance of pertinence as to have been devoid of impact on the jury. These sordid statements of hatred, emphasized by the prosecutor time and again, were assuredly not intended as pointless expressions of personal dislike of petitioner. Rather, the jurors were enjoined by McDaniel to share in his wish for "instant justice," Resp. Br. p. 38, and to transform this wish into reality by returning a guilty verdict and a recommendation of death.

Not only does respondent pretend to obliviousness of the plain import of the prosecution's arguments; it also insists that the jurors who determined petitioner's guilt were too wise to have been taken in by these improper tactics. Why this Court should now attribute to the jurors an ability to sift out and disregard the irrelevant and the improper, when the prosecutors who tried petitioner and who were familiar with rural Florida jurors obviously deemed the jurors to lack such a faculty, respondent does not explain.

This Court has pointed out in the past that, because attorneys for the sovereign bring with them in the eyes of the jurors not merely official backing and a desire to procure convictions but a presumed concern to see that justice is done, their arguments carry an apparent legitimacy that, in most circumstances, will induce

acceptance of their relevance without critical reflection. As the Court stated in *Berger v. United States*, 295 U.S. 78, 88 (1935), in speaking of the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction":

> "It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions [and] insinuations . . . are apt to carry much weight against the accused when they should properly carry none."

In sum, having repeatedly sought to influence the jury by resort to flagrantly improper arguments, the state should not now be shielded from a finding that its misconduct had its intended effect through allowance of a plea that its attorneys' acts so far exceeded the bounds of legitimate argument that jurors of ordinary intelligence would have paid no attention.

Hence, even accepting respondent's three-pronged test of constitutional improperity in closing argument, once the prosecution's summation is acknowledged to have been repleted with "inflammatory irrelevancies" without "rational relationship to the question of guilt or innocence," Resp. Br. pp. 38, 31, and the misconduct is shown by its very repetition to have been willful, prejudicial effect must be presumed. And, as the Court has frequently recognized in deciding whether a particular procedure or circumstance deprived a defendant of due process, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955); see *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966); *Estes v. Texas*, 381 U.S. 532, 542-43 (1965); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965).

2. In our opening brief (pp. 28-31) we showed that under the standards of *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), and *Chapman v. California*, 386 U.S. 18, 23-24 (1967), the prosecution's impairment of petitioner's right to a trial consistent with due process of law cannot be deemed to have been harmless constitutional error.

Respondent does not directly challenge this showing but instead asks that the Court abandon the *Chapman* standard—at least with respect to constitutional violations not comprehended within any of the specific guarantees of the Bill of Rights—and adopt in its stead a harmless constitutional error test so feckless as to shield from reversal most imaginable infringements of the Fourteenth Amendment rights of criminal defendants. Resp. Br. pp. 41-45.

As we understand respondent's proposed reformulation, it posits that in a case like the present one the inquiry should be whether, absent the constitutionally impermissible conduct or circumstance, sufficient evidence would have been before the jury to permit it to return a guilty verdict. Thus, respondent contends that the constitutional error here was harmless, because "[h]ad no closing argument been made by the state, the jury could and would have still had before it sufficient evidence to convict." Resp. Br. p. 44.

Under respondent's harmless constitutional error reformulation, then, not only is the beneficiary of the constitutional infraction to be relieved of the burden of showing that no harm ensued, but the party victimized by the wrong is to be compelled to demonstrate that, had there been no wrongdoing, he would have been entitled to a directed verdict or acquittal. Put most charitably, respondent's position is nonsense.

First, its reformulation proves much too much, for it would immunize from review all errors, even of constitutional dimension, not involving an evidentiary ruling. Thus, for example, no misconduct in summation, however egregious, could ever lead to the reversal of a criminal conviction.

Respondent's contention proves too much in a second sense, also, for it is inconsistent with many settled decisions of this Court. Respondent's formulation of the harmless error standard would, for example, require the rejection of such plainly sound decisions as *Sheppard v. Maxwell, supra, Estes v. Texas, supra,* and *Turner v. Louisiana, supra.*

Third, respondent's proposed formulation would impose upon victims of asserted constitutional errors a more onerous standard of review than that which prevails in instances of non-constitutional error. As the Court noted in *Chapman v. California, supra,* 386 U.S. at 24, the "common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." Respondent proposes that this rule be reversed–but only with respect to cases of constitutional error.

Fourth, respondent's contention flies squarely in the face of an essential premise of the *Chapman* decision that "[c]ertainly . . . constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

Finally, as a matter of policy, the harmless error standard for which respondent contends would be a most unsound one, for it would invite prosecutorial misconduct, assuring in advance that, in most instances,

the misconduct would be beyond federal remedy. Moreover, it would afford such assurance even when, as in the present case, the misconduct complained of was both willful and flagrant.

In sum, logic, precedent and sound policy all condemn respondent's effort to avoid the reversal of petitioner's conviction by urging the adoption of a watered-down test of harmless constitutional error. The Court should adhere to the standard of the *Chapman* case and should vacate petitioner's conviction and death sentence.

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